

## IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Personal Restraint	)	
Petition of	)	No. 56922-8-I
	)	
EARL MOORE,	)	<b>DIVISION ONE</b>
	)	
Petitioner,	)	UNPUBLISHED OPINION
	)	
v.	)	
	)	
STATE OF WASHINGTON,	)	
	)	
Respondent.	)	FILED: September 25, 2006
	)	

**APPELWICK, C.J.** — Earl Moore was convicted by a jury of murder in the second degree. The State proceeded on a felony murder theory, predicated on the felony of assault of a child in the second degree under RCW 9A.26.130(1)(a). Moore argues that under In re Personal Restraint of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002), superseded by RCW 9A.32.050 (2003), as recognized in State v. Gamble, 154 Wn.2d 457, 114 P.3d 646 (2005), his conviction should be overturned. We hold that assault of a child in the second degree under RCW 9A.26.130(1)(a) cannot serve as the predicate felony for second-degree felony murder. We vacate Moore's conviction and remand for

further proceedings consistent with this opinion.

### **FACTS**

In 1998, Moore was convicted by a jury of second-degree murder in the death of his fiancée's four-month-old daughter, T.R.B. His conviction was upheld on direct appeal by this court in an unpublished opinion, State v. Moore, 1999 Wn. App. LEXIS 1325, No. 42794-6-I (1999). The underlying facts are set forth in that opinion. Moore's jury was instructed as follows:

[Instruction] No. 7

A person commits the crime of murder in the second degree when he or she commits assault of a child in the second degree and in the course of and in furtherance of such crime he or she causes the death of a person other than one of the participants.

[Instruction] No. 8

To convict the defendant of the crime of murder in the second degree, as charged, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 9th day of March, 1997, through the 10th day of March, 1997, [T.R.B.] was killed;
- (2) That the defendant was committing Assault of a Child in the Second Degree;
- (3) That the defendant caused the death of [T.R.B.] in the course of and in furtherance of such crime;
- (4) That [T.R.B.] was not a participant in the crime; and
- (5) That the acts occurred in the State of Washington.

[Instruction] No. 10

A person commits the crime of assault of a child in the second

degree if the person is eighteen years of age or older and the child is under the age of thirteen and the person commits the crime of assault in the second degree against the child.

[Instruction] No. 11

A person commits the crime of assault in the second degree when he intentionally assaults another and thereby recklessly inflicts substantial bodily harm.

Moore contends that under Andress, his second-degree felony murder conviction predicated on assault of a child in the second degree is contrary to Washington law and must be vacated. The State argues that this court cannot conclude that the Legislature did not intend second-degree felony murder to be predicated on assault of a child in the second degree, and that Moore's conviction should be upheld.

### **ANALYSIS**

Under RCW 10.73.090(1), "[n]o petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction." Our Supreme Court has held that second-degree felony murder with assault as the predicate under former RCW 9A.32.050 is a non-existent crime under Andress, and that such a conviction is accordingly invalid on its face and not subject to RCW 10.73.090's time-bar. In re Pers. Restraint of Hinton, 152 Wn.2d 853, 857-58, 100 P.3d 801 (2004).<sup>1</sup>

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<sup>1</sup> In Hinton, the court clarified that the Andress decision applied retroactively to all defendants convicted under former RCW 9A.32.050(1)(b) (1976) and that the 2003 amendments applied

RCW 9A.36.130 defines assault of a child in the second degree:

(1) A person eighteen years of age or older is guilty of the crime of assault of a child in the second degree if the child is under the age of thirteen and the person:

(a) Commits the crime of assault in the second degree, as defined in RCW 9A.36.021, against a child; or

(b) Intentionally assaults the child and causes bodily harm that is greater than transient physical pain or minor temporary marks, and the person has previously engaged in a pattern or practice either of (i) assaulting the child which has resulted in bodily harm that is greater than transient pain or minor temporary marks, or (ii) causing the child physical pain or agony that is equivalent to that produced by torture.

It is clear from Moore's jury Instructions 7 and 8 that the State proceeded entirely on a felony murder theory, and from Instruction 10 that the State used the means defined in RCW 9A.36.130(1)(a), and not .130(1)(b), to convict Moore.

The State argues that the statutory definition of assault of a child in the second degree includes an assault under RCW 9A.36.130(1)(b) that is a culmination of a pattern or practice of assaulting or torturing a child, and thus does not involve a single act of assault. See State v. Kiser, 87 Wn. App. 126, 130, 940 P.2d 308 (1997) (holding that crime set out in similar provision in assault of a child in the first degree statute "is defined not by a single act, but by a course of conduct"). The State contrasts this with the alternative means of committing assault in the second degree, which all involve a single act of assault. See RCW 9A.36.021 (defining various means of committing assault in the second degree). The State contends that the Andress reasoning therefore

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only prospectively. Hinton, 152 Wn.2d at 857-58, 861. Because Moore was convicted under former RCW 9A.32.050(1)(b) (1976), the Andress decision applies to his conviction.

would not render the “in furtherance of” language of former RCW 9A.32.050 meaningless if felony murder was predicated on assault of a child in the second degree, because the death could be said to further the pattern or practice of assaulting or torturing the child.

The State argues that even though Moore was charged and convicted under RCW 9A.36.130(1)(a), not .130(1)(b), “Moore can point to no instance where a court has found that the felony murder doctrine applies to some alternative means of committing a crime but not to other alternative means of committing the same crime.” The State concludes that by enacting the crime of assault of a child in the second degree and defining a means that encompasses a series of acts rather than a single act, the Legislature intended all alternative means of committing this assault to serve as predicates for second-degree felony murder.

Moore argues that because he was charged and convicted under RCW 9A.36.130(1)(a), and not .130(1)(b), whether the reasoning of Andress applies to .130(1)(b) is irrelevant. Moore cites to State v. DeRosia, 124 Wn. App. 138, 148, 100 P.3d 331 (2004), which held that the “Andress court’s rationale does not support a distinction based on the age of the victim.” See also State v. Madarash, 116 Wn. App. 500, 516, 66 P.3d 682 (2003) (reversing second-degree felony murder bench trial conviction predicated on third-degree child assault).<sup>2</sup>

We agree with Moore. Moore was not charged or convicted under RCW

9A.36.130(1)(b), the “pattern or practice” means of assault of a child in the second degree. He was charged and convicted under RCW 9A.36.130(1)(a). Thus, the only difference between the elements of his charge and the charge in Andress is that the State must additionally have proved that he was at least 18 years old and that his victim was under 13 years old. As the DeRosia court held,

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<sup>2</sup> The DeRosia court cited Madarash as another case holding that Andress applies to child assault. DeRosia, 124 Wn. App. at 148. It is not entirely clear from the language of the Madarash decision whether the defendant was charged with assault in the third degree, or assault of a child in the third degree. The Madarash court noted that “the State charged Madarash with homicide by abuse under RCW 9A.32.055 and second degree felony murder under RCW 9A.36.031(1)(d) and/or (f). The predicate felony was third degree assault.” Madarash, 116 Wn. App. at 505 (emphasis added). Assault of a child in the third degree is under RCW 9A.36.140, but provides that “[a] person eighteen years of age or older is guilty of the crime of assault of a child in the third degree if the child is under the age of thirteen and the person commits the crime of assault in the third degree as defined in RCW 9A.36.031(1)(d) or (f) against the child.” Thus, the only difference in the elements of assault in the third degree and assault of a child in the third degree is the ages of the victim and perpetrator.

there is nothing in the Andress rationale that would distinguish these two offenses based on the victim's age. Therefore, the Andress reasoning mandates reversal of Moore's conviction. We reject the State's contention that even though Moore was charged and convicted based on one means of committing assault of a child in the second degree, he is not entitled to relief because a different means of committing that assault may not fall within the scope of the Andress decision.<sup>3</sup>

We hold that assault of a child in the second degree under RCW 9A.36.130(1)(a) cannot serve as the predicate felony for second-degree felony murder. Thus, Moore's conviction is invalid on its face and not subject to RCW 10.73.090's time-bar for collateral review. See Hinton, 152 Wn.2d at 857-58.

We vacate Moore's conviction and remand for further proceedings consistent with this opinion.

Appelwick, J.

WE CONCUR:

Grosz, J.

Columan, J.

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<sup>3</sup> Moore argued that the assault of a child in the second degree under the .130(1)(b) "pattern or practice" alternative means would also be an impermissible predicate felony for felony murder under Andress. Because we vacate Moore's conviction under .130(1)(a), we decline to decide this question.